

1 A. IT WAS.

2 Q. AND THEY DIDN'T TAKE INTO ACCOUNT, QUOTE, THE VALUE OF AN
3 INJUNCTION?

4 A. VIRTUALLY EVERY TV MANUFACTURER HAD SIGNED UP FOR THE
5 RATE, AND THERE HAD BEEN NO VARIANCE IN THE RATE. SO THEY --
6 THE -- ESSENTIALLY THERE WAS NO ANALYSIS PERFORMED OR DESIRED
7 IN TERMS OF THE VALUE OF AN INJUNCTION FOR THAT PARTICULAR
8 FACT.

9 Q. NOW DURING THE TRIAL YOU TESTIFIED AS TO A REASONABLE
10 ROYALTY RATE THAT WOULD BE INCLUDED IN A LICENSE THAT WOULD BE
11 EXECUTED BY DIRECTV AND FINISAR; DID YOU NOT?

12 A. YES. THAT'S CORRECT.

13 Q. AND YOU ASSUMED THE DURATION OF THAT LICENSE WOULD BE
14 UNTIL THE EXPIRATION OF THE PATENT; ISN'T THAT CORRECT?

15 A. AS DID DIRECTV'S DAMAGES EXPERT; THAT'S RIGHT.

16 Q. SO YOU DIDN'T -- IN YOUR TESTIMONY IN FRONT OF THE JURY,
17 YOU DIDN'T ASSUME THAT THERE WOULD BE AN INJUNCTION ENTER IN
18 COMING UP WITH YOUR ROYALTY RATE, CORRECT?

19 A. WELL, COMING UP WITH MY DAMAGES, I ABSOLUTELY DID. MY
20 DAMAGES CUT OFF THE REVENUES THE ACCUSED --

21 Q. I UNDERSTAND THAT. BUT IN DETERMINING WHAT THE RATE AND
22 THE BASE WOULD BE, YOU DID NOT ASSUME THAT THERE WOULD BE AN
23 INJUNCTION?

24 A. ONE OF THE GEORGIA PACIFIC FACTORS IS THE DURATION OF THE
25 LICENSE AGREEMENT, AND I PRESUMED THAT THAT LICENSE AGREEMENT

1 WOULD RUN THROUGH THE LIFE OF THE PATENT; THAT IS CORRECT.

2 Q. OKAY. HOW DO YOU RECONCILE THE JURY VERDICT WITH YOUR
3 OPINION THAT THE DAMAGES SHOULD HAVE BEEN \$1.7 BILLION?

4 A. I HAVE -- I CANNOT RECONCILE THAT. THERE'S ABSOLUTELY --
5 ABSENCE OF INFORMATION AS TO WHAT THE TOOLS OR ANALYSIS OR
6 EMPHASIS OR WEIGHTS THAT THE JURY PLACED ON THE INFORMATION
7 THAT IT WAS PRESENTED.

8 Q. WE TALKED ABOUT THE IMPEG DECODERS AND ENCODERS DURING
9 YOUR TESTIMONY AT TRIAL. AM I CORRECT THAT YOU TESTIFIED THAT
10 NONE OF THE LICENSES FOR THE IMPEG DECODERS AND ENCODERS IS
11 BASED ON A PERCENTAGE OF GENERAL REVENUE?

12 A. TESTING MY MEMORY NOW, MR. SAVIKAS. BUT I BELIEVE THAT IS
13 CORRECT, THAT NONE OF THOSE LICENSES ARE BASED UPON A
14 PERCENTAGE OF REVENUE BASIS FOR THE SET TOP BOXES.

15 Q. ARE YOU AWARE OF ANY TECHNOLOGY IN THE SATELLITE
16 TELEVISION BUSINESS THAT IS BASED ON A GROSS REVENUE?

17 A. WELL, I GUESS NOT TO -- I HESITATE BECAUSE GROSS REVENUES
18 CAN BE DEFINED AS, FOR EXAMPLE, THE MACROVISION AGREEMENT WITH
19 DIRECTV HAD TO DO WITH THE GROSS REVENUES -- THE BASE WAS THE
20 GROSS REVENUES DERIVED FROM THE USE OF THE MACROVISION
21 TECHNOLOGY FOR SECURITY ISSUES. SO IF DIRECTV HAD A REVENUE
22 THAT THEY CHARGED YOU AND I ON A PAY PER VIEW BASIS, THEY'D PAY
23 IT ON A PERCENTAGE OF THAT REVENUE.

24 Q. RIGHT. BUT IT WASN'T THE GROSS REVENUES OF THE COMPANY,
25 WAS IT?

1 A. IT WAS NOT.

2 Q. OKAY. EITHER MR. ROBERTS OR MR. VEDERKA SAID THAT
3 DIRECTV'S ENTERPRISE WAS BASED ON INFRINGING TECHNOLOGY. DID
4 YOU HEAR THAT STATEMENT?

5 A. I BELIEVE I DID, YES.

6 Q. NOW, DIRECTV WAS IN BUSINESS AND BROADCASTING LONG BEFORE
7 THE FINISAR PATENT ISSUED, CORRECT?

8 A. AGAIN, NOT TO QUIBBLE. LONG BEFORE -- I BELIEVE THEY WERE
9 BROADCASTING BEFORE --

10 Q. WELL, YOU TESTIFIED ABOUT AN AWARD THAT THEY GOT IN
11 FEBRUARY OF 1995 THAT'S THE MOST SUCCESSFUL CONSUMER
12 ELECTRONICS PRODUCT?

13 A. YEAH. THEY LAUNCHED -- I BELIEVE IT'S FEBRUARY 1995,
14 AGAIN NOT TO CORRECT YOU, MR. SAVIKAS; AND, YES, THEY HAD BEEN
15 BROADCASTING BEFORE. I DON'T KNOW ABOUT LONG BEFORE, BUT THEY
16 HAD BEEN BROADCASTING BEFORE THE 505 PATENT ISSUE.

17 Q. AND THE 505 PATENT CAME OUT IN APRIL OF 1995, CORRECT?

18 A. THAT'S MY RECOLLECTION, YES.

19 Q. ALL RIGHT. ONE OF YOUR SLIDES YOU SAID THAT ECHOSTAR IS
20 THE ONLY DBS COMPETITOR; DO YOU RECALL THAT TESTIMONY?

21 A. YES. AS WE SIT HERE TODAY, YES.

22 Q. ARE YOU AWARE THAT ECHOSTAR TRIED TO BUY DIRECTV ON ONE
23 OCCASION?

24 A. YES.

25 Q. AND ARE YOU AWARE THAT THE JUSTICE DEPARTMENT BROUGHT AN

1 ANTI-TRUST SUIT AGAINST ECHOSTAR TO PREVENT THAT ACQUISITION?

2 A. I DON'T KNOW ABOUT THE FOUR RAMIFICATIONS, BUT I BELIEVE
3 THERE WAS SOME TALK ABOUT IT ONLY FROM -- ON MY KNOWLEDGE ONLY
4 FROM THE GENERAL PRESS.

5 Q. WELL, THE COMPLAINT WAS ATTACHED TO THE -- I'M SORRY. THE
6 JUSTICE DEPARTMENT COMPLAINT WAS ATTACHED TO FINISAR'S
7 COMPLAINT IN THIS CASE. DO YOU RECALL THAT?

8 A. I DON'T. I'M SORRY.

9 Q. AND DO YOU RECALL THAT THE JUSTICE DEPARTMENT SAID THAT
10 THERE COULD NOT BE A SINGLE SATELLITE PROVIDER IN THIS COUNTRY?

11 A. I DON'T RECALL THAT, EITHER.

12 Q. DO YOU RECALL THAT A PRESS RELEASE TO THAT EFFECT IS
13 ATTACHED TO FINISAR'S COMPLAINT IN THIS CASE?

14 A. I DON'T RECALL.

15 Q. WOULD IT SURPRISE YOU THAT THE ECHOSTAR SET TOP BOXES ARE
16 TOTALLY INCOMPATIBLE WITH DIRECTV'S BOXES?

17 A. AGAIN, I'VE SEEN THERE'S SOME INDICATIONS THAT THERE'S
18 SOME CONVERGENCE, A DESIRE TO COMODITIZE SET TOP BOXES AND MAKE
19 THEM COMPATIBLE. BUT AS I UNDERSTAND IT AS WE SIT HERE TODAY,
20 THAT THEY ARE DIFFERENT. THEY ARE DIFFERENT, THAT ONE CAN'T
21 TALK TO THE OTHER.

22 Q. YOU HAVE -- AS I RECALL, YOU HAVE A DISH SYSTEM, RIGHT?

23 A. I HAVE A DIRECTV SYSTEM.

24 Q. YOU CAN'T GET A DISH SIGNAL, CAN YOU?

25 A. NOT THAT I'M AWARE OF, NO.

1 Q. OKAY. YOU TALKED ABOUT CABLE BEING A COMPETITOR. ARE YOU
2 AWARE OF THE INTRODUCTION OF THE FIBER OPTIC TELEVISION SYSTEMS
3 NOW BEING OFFERED BY THE LOCAL BELLS?

4 A. NO.

5 Q. DO YOU KNOW ABOUT VERIZON OFFERING THEIR FIOS SYSTEM?

6 A. I DON'T.

7 Q. THE GEM STAR MONTHLY ROYALTY THAT YOU TALKED ABOUT, THAT'S
8 NOT A PERCENTAGE OF ANY GROSS REVENUE, IS IT; THAT'S SIMPLY A
9 FIXED AMOUNT PER MONTH?

10 A. WELL, IT'S -- IT IS BASED UPON ULTIMATELY -- NOT BASED
11 UPON -- IT RELATES TO GROSS REVENUE BECAUSE IT'S BASED UPON
12 NUMBER OF SUBSCRIBERS THAT CORRELATES TO REVENUE EARNED BY
13 DIRECTV, SO --

14 Q. IS IT --

15 A. -- 20 CENTS PER SUBSCRIBER PER MONTH.

16 Q. 20 CENT PER SUBSCRIBER PER MONTH. THAT'S IRRESPECTIVE OF
17 HOW MUCH PROFIT OR REVENUE DIRECTV GENERATES.

18 A. THAT IS NOT -- THAT IS -- YOU ARE RIGHT. IT IS DIVORCED
19 FROM THE AMOUNT THAT SUBSCRIBER IS CHARGED FOR THE DIRECTV
20 SERVICE. BUT OBVIOUSLY THE NUMBER OF SUBSCRIBERS RELATES TO
21 DIRECTV'S REVENUES.

22 Q. AND YOU SAID DIRECTV NO LONGER HAS THE CORPORATE
23 RELATIONSHIP WITH THE SET TOP BOX MANUFACTURER, AS I RECALL?

24 A. THAT WAS MY UNDERSTANDING.

25 Q. DO YOU KNOW NOW HOW DIRECTV SECURES ITS SET TOP BOXES?

1 A. I DON'T HAVE ANY SPECIFIC KNOWLEDGE OF THAT. I DO NOTE
2 THAT THERE WAS SOME DIFFICULTY IN DIRECTV ACTUALLY DETERMINING
3 HOW MANY SET TOP BOXES THAT THEY'VE DELIVERED TO CONSUMERS,
4 WHICH DOESN'T SURPRISE ME SINCE THEY'RE NOT A SET TOP BOX
5 MANUFACTURER.

6 Q. OKAY. HAVE YOU EVER TESTIFIED IN CONNECTION WITH A
7 COMPULSORY ROYALTY?

8 A. ONLY THE ONE EXAMPLE I GAVE WHERE I'M FAMILIAR WITH THE
9 COMPULSORY -- WELL, I WOULD SAY A LICENSE THAT WAS IMPOSED UPON
10 THE INFRINGER.

11 Q. ARE YOU FAMILIAR --

12 A. I DON'T BELIEVE I'VE TESTIFIED -- I PROVIDED TESTIMONY IN
13 THAT CASE, SO I'M NOT QUITE SURE WHAT YOU MEAN BY COMPULSORY
14 LICENSE.

15 Q. DID YOU -- WERE YOU THE ONE WHO OPINED THAT FIVE PERCENT
16 WAS THE APPLICABLE ROYALTY RATE?

17 A. I DIDN'T SAY ANYTHING ABOUT A FIVE PERCENT RATE.

18 Q. I'M SORRY, THE ESTABLISHED RATE. YOU SAID THERE WAS AN
19 ESTABLISHED RATE IN THAT CASE?

20 A. THERE WERE 30 AGREEMENTS THAT WERE WITHIN EYELASHES OF
21 EACH OTHER, AND SO, YES, I OPINED AS TO THAT PARTICULAR RATE.

22 Q. AND IN GRANTING THE COMPULSORY LICENSE, THE COURT ADOPTED
23 THE RATE -- THE ESTABLISHED RATE THAT YOU TESTIFIED ABOUT?

24 A. THEY -- I'M NOT SURE THEY RELIED UPON MY TESTIMONY AS MUCH
25 AS THEY ESSENTIALLY LOOKED AT THE 30 DIFFERENT LICENSE

1 AGREEMENTS AND USED THAT INFORMATION TO MAKE A DETERMINATION.

2 Q. ALL RIGHT.

3 A. I'M NOT SURE HOW --

4 Q. IN --

5 A. -- WHAT RELIANCE THEY PLACED ON MY TESTIMONY.

6 Q. IN DECIDING THE COMPULSORY ROYALTY RATE, SHOULD THIS COURT
7 TAKE INTO ACCOUNT THE JURY VERDICT AT ALL?

8 A. THE -- IT WOULD SEEM TO ME THAT THE CHALLENGE IN TAKING
9 ACCOUNT OF THE JURY VERDICT WOULD BE TO TRY TO UNDERSTAND HOW
10 THE JURY DETERMINED THAT AMOUNT AND WHAT IT TOOK INTO
11 CONSIDERATION AND WHAT EMPHASIS IT PLACED ON THE VARIOUS
12 INFORMATION AND EVIDENCE THEY HAD AVAILABLE TO IT. SO I WOULD
13 BE -- IT WOULD BE -- OBVIOUSLY, THE COURT BEING MORE WISE THAN
14 I IN THESE SITUATIONS SHOULD DO WHAT IT SHOULD. IF YOU'RE
15 ASKING ME WHAT I WOULD DO, I WOULD BE VERY CAUTIOUS IN USING
16 THAT INFORMATION IN ANY MEANINGFUL WAY.

17 Q. SHOULD THE COURT CONSIDER THE GROSS AMOUNT AT ALL?

18 A. I THINK THE -- AGAIN, I'M NOT HERE TO TELL THE COURT
19 EXACTLY WHAT TO DO. IF YOU'RE ASKING WHAT I WOULD DO, I WOULD
20 CONSIDER IT IN THE CONTEXT OF ALL THE OTHER PIECES OF
21 INFORMATION, WHICH I BELIEVE MAY HAVE MORE RELEVANCE THAN AN
22 AMOUNT THAT IS UNKNOWN -- OF UNKNOWN DETERMINATION, OF UNKNOWN
23 EMPHASIS ON THE FACTORS TO CONSIDER.

24 Q. AND AM I CORRECT THAT THIS IS THE FIRST CASE IN WHICH
25 YOU'VE BEEN CALLED AFTER A VERDICT TO TESTIFY ABOUT A

1 HYPOTHETICAL NEGOTIATION?

2 A. YES.

3 MR. SAVIKAS: NOTHING FURTHER, YOUR HONOR.

4 THE COURT: ANY MORE QUESTIONS OR MAY THE
5 WITNESS STEP DOWN?

6 MR. VEDERKA: I DON'T HAVE ANY REDIRECT, YOUR
7 HONOR.

8 THE COURT: ALL RIGHT. YOU MAY STEP DOWN, SIR.

9 THE WITNESS: THANK YOU, YOUR HONOR.

10 MR. ROBERTS: IF I MAY, YOUR HONOR.

11 THE COURT: COUNSEL, I THINK AT THIS TIME WHAT
12 WE'LL DO IS WE'RE GOING TO TAKE A BREAK UNTIL FIVE OF TO GIVE
13 THE COURT REPORTER AND EVERYBODY ELSE A LITTLE REST, AND THEN
14 WE'LL CONTINUE. WE'LL BE IN RECESS UNTIL FIVE OF.

15 (RECESS.)

16 THE COURT: GO AHEAD, COUNSEL.

17 MR. ROBERTS: THANK YOU, YOUR HONOR. JUST A
18 COUPLE OF COMMENTS. I WOULD SUGGEST TO THE COURT THAT THE
19 REASON MR. NAPPER HAS NOT TESTIFIED ABOUT A NEW HYPOTHETICAL
20 NEGOTIATION IN POST VERDICT CASES BEFORE IS THAT IN THOSE CASES
21 WHAT WE TYPICALLY FIND IS THERE IS AN ESTABLISHED ROYALTY. AND
22 BECAUSE THERE'S AN ESTABLISHED ROYALTY, THERE IS NO ANALYSIS
23 NEEDED. THAT POINT REALLY HIGHLIGHTS THE FACT WHY IN THIS CASE
24 AN INJUNCTION SHOULD BE ISSUED BECAUSE OF THE DIFFICULTY IN
25 EVALUATING THE VALUE OF THE RIGHT TO EXCLUDE.

1 THE OTHER POINT I WANTED TO MAKE HERE IS THAT
2 BECAUSE DIRECTV'S INFRINGEMENT HAS BEEN DETERMINED TO BE
3 WILLFUL, ANY ONGOING PRACTICE OF THE PATENT BY DIRECTV SHOULD
4 BE SUBJECT TO TREBLE DAMAGES. SO SHOULD THE COURT DECIDE TO
5 ENTER A ROYALTY OR SOME OTHER COMPULSORY LICENSE GOING FORWARD,
6 THE AMOUNT THAT DIRECTV SHOULD BE PAYING UNDER THAT SHOULD TAKE
7 INTO ACCOUNT THE FACT THAT THAT REALLY IS WILLFUL INFRINGEMENT
8 AND THAT WE'RE LICENSING WILLFUL INFRINGEMENT.

9 THE COURT: THAT'S A NEAT ARGUMENT, COUNSEL, BUT
10 AS A MATTER OF ALMOST LAW, ONCE A JURY HAS FOUND INFRINGEMENT
11 IN A TRIAL, ANY FUTURE USE OF THE -- OF THE PATENT OR OF THE
12 INVENTION WOULD ALMOST -- I MEAN, AS A MATTER OF LAW BE
13 WILLFUL. HOW COULD IT BE OTHERWISE? YOU KNOW FOR AN ABSOLUTE
14 FACT THAT YOU'RE INFRINGING, AND YOU DO IT ANYWAY.

15 MR. ROBERTS: MY VERY POINT.

16 THE COURT: YOU'RE GOING TO STAND UP AND SAY NO,
17 IT'S NOT WILLFUL. SO THAT WOULD APPLY IN EVERY CASE WHETHER
18 THE JURY FOUND WILLFULNESS IN THE PAST OR NOT. AND I'VE NEVER
19 SEEN A CASE THAT SAID: WELL, ALL FUTURE DAMAGES SHOULD ALWAYS
20 BE TREBLED BECAUSE THEY'RE ALWAYS WILLFUL. I MEAN, THAT --
21 UNLESS YOU'VE GOT A CASE TO THAT EFFECT.

22 MR. ROBERTS: WELL, I BELIEVE THERE ARE SOME
23 CASES IN THE BRIEF WHERE IT TALKED ABOUT IMPOSING DAMAGES FOR A
24 PERIOD DURING, SAY, A STAY OF AN INJUNCTION AND WHERE THE COURT
25 ENHANCED THOSE DAMAGES BY A FURTHER AMOUNT. I THINK THAT THE

1 FACTOR 50 PERCENT --

2 THE COURT: WELL, IF YOU'RE -- BECAUSE IT'S NOT
3 EXACTLY A COMPULSORY LICENSE. IT'S A SHORT PERIOD OF TIME
4 WHERE THEY'RE SAYING THERE SHOULDN'T BE AN INJUNCTION, WE WANT
5 TIME FOR A STAY AND SO ON AND SO FORTH.

6 MR. ROBERTS: AND DURING MR. NAPPER'S
7 EXAMINATION, I WENT BACK AND CHECKED THE COURT'S COMMENTS ON
8 THE LAST DAY OF TRIAL AFTER THE JURY VERDICT CAME BACK. AND
9 ONE OF THE COMMENTS THE COURT MADE WAS THAT THE PATENT HAS
10 NEVER BEEN USED AND THAT WE HAD UNCONVERTED TESTIMONY BY
11 DR. LEVINSON TO THAT EFFECT. AND I WOULD JUST MERELY POINT OUT
12 THAT IT WAS THAT VERY ARGUMENT THAT THE SUPREME COURT REJECTED
13 IN EBAY AS PROVIDING A CATEGORICAL APPROACH FOR DENYING AN
14 INJUNCTION. AND IN FACT, THERE IS -- THE CONTINENTAL PAPER BAG
15 DECISION BY THE U.S. SUPREME COURT STANDS FOR THAT VERY
16 PROPOSITION. IT SAYS THE FEDERAL COURTS HAVE THE RIGHT TO
17 ENTER AN INJUNCTION, EVEN THOUGH THE PATENTEE -- AND I THINK
18 THE LANGUAGE IN THAT DECISION WAS -- UNREASONABLY FAILED TO
19 PRACTICE THE INVENTION. THE PROBLEM THAT WE'RE REALLY
20 FACING --

21 THE COURT: LET ME MAKE IT VERY CLEAR FOR THE
22 RECORD, YES, YOU'RE CORRECT. BUT THAT'S ALWAYS BEEN THE LAW.
23 YOU CAN'T JUST PICK ONE OF THE FOUR FACTORS AND IMPOSE A
24 CATEGORICAL DECISION ON INJUNCTIONS AND NONINJUNCTION. BUT
25 JUST BECAUSE YOU CAN'T, THAT DOESN'T MEAN YOU SHOULDN'T

1 CONSIDER THAT FACTOR.

2 MR. ROBERTS: RIGHT. AND I'M JUST -- MY POINT
3 IS WHEN YOU CONSIDER THAT FACTOR, BY NECESSITY COMES OUT IN
4 FAVOR OF FINISAR. THE OTHER POINT THE COURT MADE IN THOSE
5 COMMENTS WAS THAT THE DETRIMENT TO THE PUBLIC. AND HERE, OF
6 COURSE, WE'RE NOT OPPOSING SOME SORT OF A PHASE OUT PERIOD IN
7 ORDER TO ENABLE DIRECTV TO INTEGRATE DESIGN ALTERNATIVES. OF
8 COURSE, AS I MENTIONED THERE'S ALWAYS THE POSSIBILITY OF THEM
9 NEGOTIATING A LICENSE. THEY HAVE NOT MADE A CASE FOR THE
10 CRITICAL PUBLIC INTEREST, WHICH IS REALLY WHAT IS REQUIRED
11 UNDER THIS FACTOR.

12 FINALLY, I WOULD NOTE THAT BECAUSE OF THE
13 SITUATION HERE WHERE WE'RE TRYING TO VALUE WHAT THIS INJUNCTION
14 WOULD BE WORTH, WE'RE TRYING TO VALUE DAMAGES ONGOING, WE HAVE
15 THE ADDITIONAL PROBLEM THAT THERE ARE ISSUES WHERE FINISAR
16 WOULD HAVE A RIGHT TO A JURY TRIAL. JURY TRIAL FACT ISSUES
17 ABOUT DAMAGES ARE NECESSARILY GOING TO ARISE AND, IN FACT, I
18 BELIEVE THAT'S WHY JUDGE DAVIS IN THE Z4 CASE SEVERED POST
19 VERDICT DAMAGES. AND SO AGAIN WE SEE THE DIFFICULTY OF ONGOING
20 LITIGATION ARISING BY FAILURE TO ENTER THE INJUNCTION. THAT'S
21 ALL WE HAVE FOR NOW, YOUR HONOR.

22 THE COURT: ALL RIGHT.

23 MR. SAVIKAS: YOUR HONOR, WE'RE GOING TO PRESENT
24 THE TESTIMONY OF RICH DONALDSON AND THEN THOMAS MCGEORGE, AND
25 THEN MR. CASTANIAS IS GOING TO MAKE THE ARGUMENTS --

1 THE COURT: ALL RIGHT.

2 MR. SAVIKAS: -- IN RESPONSE TO FINISAR'S CASE.

3 SO I'D LIKE TO CALL MR. RICHARD DONALDSON TO THE STAND, PLEASE.

4 RICHARD DONALDSON,

5 HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

6 I D I R E C T E X A M I N A T I O N

7 BY MR. SAVIKAS:

8 Q. WOULD YOU STATE YOUR NAME FOR THE RECORD AGAIN, SIR.

9 A. RICHARD DONALDSON.

10 Q. AND ARE YOU THE SAME RICHARD DONALDSON WHO TESTIFIED AT
11 TRIAL ON THE APPROPRIATE DAMAGE ANALYSIS?

12 A. YES, I AM.

13 Q. SINCE THE DATE OF YOUR TESTIMONY, HAS YOUR OPINION ON THE
14 CORRECT REASONABLE ROYALTY RATE CHANGED AT ALL?

15 A. NO, IT HAS NOT.

16 Q. AND WHY NOT?

17 A. BECAUSE I HADN'T SEEN ANYTHING NEW THAT WOULD CHANGE THE
18 ROYALTY STRUCTURE AS FAR AS WHAT WE'VE CALLED THE CONSUMER
19 ELECTRONICS ROYALTY MODEL.

20 Q. NOW, TO GIVE CREDENCE AND HONOR TO THE JURY VERDICT, DO
21 YOU HAVE AN OPINION AS TO THE APPROPRIATE WAY TO COMPUTE
22 DAMAGES FROM THE DATE OF TRIAL TO THE EXPIRATION OF THE 505
23 PATENT SHOULD THE COURT GRANT A COMPULSORY LICENSE?

24 A. YES, I DO. I THINK BASICALLY TWO THINGS: FIRST, THE
25 ROYALTY STRUCTURE WHICH WE'VE TALKED ABOUT WHICH I TESTIFIED

1 ABOUT BEING THE CONSUMER ELECTRONICS MODEL, WHICH IS A FIXED
2 FEE PER SET TOP BOX BASICALLY, I THINK THAT IS THE MODEL. IT
3 APPEARS TO BE THE MODEL MOST CLOSELY ALIGNED WITH WHAT THE JURY
4 LIKELY DID, PLUS IT REPRESENTS OR IS CONSISTENT WITH INDUSTRY
5 PRACTICE, WHICH I DISCUSSED IN MY PRIOR TESTIMONY. SO THE
6 ROYALTY STRUCTURE IS ASSUMING THE ELECTRONICS MODEL IS CORRECT,
7 AND ALSO LOOKING AT THE AMOUNT OF DAMAGES OR WHAT THE JURY
8 DETERMINED TO BE A REASONABLE ROYALTY, I THINK IF YOU COMPUTE
9 THAT IT COMES OUT TO \$1.32 PER SET TOP BOX. AND I THINK IF
10 THAT WERE CONTINUED FORWARD, THAT WOULD GIVE RECOGNITION OF THE
11 MAGNITUDE OF A REASONABLE ROYALTY THAT THE JURY CONSIDERED.

12 THE COURT: ALL RIGHT. LET ME -- LET ME ASK A
13 COUPLE OF QUESTIONS HERE. THERE SEEMS TO HAVE BEEN A
14 TREMENDOUS AMOUNT OF PROBLEM COMING UP WITH A TOTAL OF NUMBER
15 OF SET TOP BOXES. IN FACT, YOU YOURSELF EVEN THOUGH YOU WERE
16 THEIR EXPERT WEREN'T GIVEN THE TOTAL NUMBER UNTIL JUST BEFORE
17 TRIAL. PLAINTIFFS EVEN OBJECTED TO THE LAST MINUTE CHANGE
18 WHERE I THINK YOU ALMOST CLOSE TO DOUBLED YOUR ESTIMATE. HOW
19 CAN I NOW ENTER SOME KIND OF A JUDGMENT SAYING -- IT DOESN'T
20 MATTER WHAT IT IS, A DOLLAR, \$2, \$5 PER SET TOP BOX WHEN THEY
21 CAN'T TELL ME OR TELL ANYBODY ELSE HOW MANY SET TOP BOXES THEY
22 HAVE OR ARE INSTALLING?

23 THE WITNESS: YOUR HONOR, I THINK THE NEXT
24 WITNESS WILL GO INTO MORE DETAIL, BUT WHAT HAS HAPPENED IS --

25 THE COURT: ALL RIGHT. IS YOUR NEXT WITNESS THE

1 ONE THAT'S GOING TO KNOW --

2 MR. SAVIKAS: HE'LL KNOW ABOUT THE FUTURE, BUT
3 MR. DONALDSON CAN EXPLAIN WHAT THE PROBLEM WAS IN THE
4 CALCULATION.

5 THE COURT: WELL, I'M NOT WORRIED ABOUT THE PAST
6 RIGHT NOW. THE JURY HAS DONE THAT. I'M WONDERING ABOUT THE
7 FUTURE AND THIS PROBLEM WAS SUCH A BIG PROBLEM IN THE PAST,
8 WHAT CONFIDENCE CAN I HAVE IT WON'T BE A BIG PROBLEM IN THE
9 FUTURE.

10 MR. SAVIKAS: ALL RIGHT.

11 THE COURT: GO AHEAD. AND IF YOU'VE GOT ANOTHER
12 WITNESS WHO REALLY KNOWS THAT, THERE'S NO POINT IN WASTING -- I
13 MEAN, THIS WITNESS'S TIME ON THAT.

14 THE WITNESS: I CAN JUST COMMENT VERY BRIEFLY,
15 AND THE WITNESS CAN GO INTO MORE DETAIL IS THAT DIRECTV HAS
16 CHANGED THE WAY THAT IT PURCHASES SET TOP BOX. IT HAS A DIRECT
17 RELATIONSHIP NOW WITH ALL THE SET TOP BOX MANUFACTURERS WHERE
18 IT BUYS THE COMPLETE OUTPUT FOR DIRECTV USE. AND BECAUSE OF
19 THAT, THEY NOW HAVE COMPLETE CONTROL OVER THE SET TOP BOXES,
20 AND IT'S A VERY EASY STRAIGHTFORWARD CALCULATION. THEY KEEP
21 TRACK OF THIS, AND THE NUMBERS ARE VERY READILY AVAILABLE.

22 THE COURT: ALL RIGHT.

23 Q. (BY MR. SAVIKAS) THIS \$1.32 PER SET TOP BOX, HOW DOES
24 THAT COMPARE WITH THE RANGE OF ROYALTIES THAT YOU TESTIFIED
25 ABOUT AT TRIAL?

1 A. WELL, IT FALLS WITHIN A CLUSTER. I CONSIDERED A NUMBER OF
2 THINGS LOOKING AT RELEVANT LICENSES AT OR ABOUT THE TIME OF THE
3 HYPOTHETICAL NEGOTIATIONS. AND THEY RANGE FROM LIKE TEN CENTS
4 TO 12 CENTS PER SET TOP BOX PER UNIT UP TO, YOU KNOW, THE IMPEG
5 LICENSES WHICH WERE 2.50 TO \$4. AND THEY WERE \$4 AND THEN THEY
6 DECREASED TO 2.50. THEN SOME OF THE STARSIGHT LICENSES FOR SET
7 TOP BOXES WERE IN THE RANGE OF 3.50 TO 5.50.

8 THE COURT: HOLD ON.

9 A. \$1.32 --

10 THE COURT: HOLD ON. HOLD ON. YOU SAID
11 STARSIGHT?

12 THE WITNESS: STARSIGHT, YES.

13 THE COURT: AND REFRESH MY MEMORY HOW
14 STARSIGHT -- ISN'T THAT TECHNOLOGY LICENSED BY DIRECTV?

15 THE WITNESS: IT'S -- LICENSES WERE WITH HUGHES
16 NETWORK SYSTEM, ONE OF THE OTHER DEFENDANTS.

17 THE COURT: AND WHAT WAS THE RANGE OF THAT?

18 THE WITNESS: IT WENT FROM 3.50 TO 5.50 PER SET
19 TOP BOX; AND STARSIGHT HAD, I THINK, SEVEN PATENTS THAT RELATED
20 TO ELECTRONIC PROGRAM GUIDES.

21 THE COURT: ALL RIGHT. GO AHEAD.

22 Q. (BY MR. SAVIKAS) ARE YOU AWARE OF ANY LICENSE IN THE
23 SATELLITE TELEVISION BUSINESS THAT IS BASED ON A PERCENTAGE OF
24 GROSS REVENUE?

25 A. NO, SIR, I AM NOT.

1 Q. AND AS A PARADIGM FOR GOING FORWARD, WOULD IT BE
2 REASONABLE TO HAVE THE COURT -- I'M NOT -- HAVE THE COMPULSORY
3 LICENSE BASED ON A PERCENTAGE OF GROSS REVENUE?

4 A. NO, I DON'T THINK IT WOULD BE BECAUSE INDUSTRY PRACTICE
5 DOESN'T REFLECT THAT. I MEAN, IT'S -- SO I THINK IT WOULD NOT
6 BE APPROPRIATE.

7 Q. ARE YOU IN AGREEMENT WITH MR. NAPPER'S OPINION THAT IT
8 WOULD NOW BE PROPER TO HAVE THE COURT CONDUCT THE NEW
9 HYPOTHETICAL NEGOTIATION AS OF JUNE 2006?

10 A. NO, I'M NOT.

11 Q. WHY NOT?

12 A. WELL, FOR -- FOR A NUMBER OF REASONS. FIRST OF ALL, ALL
13 THE -- WHAT I THINK THE RELEVANT ISSUES WERE, IF YOU LOOK AT --
14 WERE CONSIDERED AT THE ORIGINAL, WERE CONSIDERED IN MY ANALYSIS
15 AND ALSO IN MR. NAPPER'S ANALYSIS, WILL YOU CONSIDER WERE THE
16 HYPOTHETICAL NEGOTIATIONS, THE PATENTS VALID, PATENTS
17 INFRINGED? YOU LOOK AT WHETHER THE LICENSE IS EXCLUSIVE OR
18 NONEXCLUSIVE. YOU LOOK AT THE LIFE OF THE PATENT. YOU LOOK AT
19 THE IMPORTANCE OF THE TECHNOLOGY. AND YOU LOOK AT ALL THESE
20 THINGS AND DETERMINE WHAT IS A REASONABLE ROYALTY FOR THE LIFE
21 OF THE PATENT IF THE PARTIES ACTUALLY SIT DOWN AND NEGOTIATED.
22 NONE OF THAT HAS CHANGED, SO I DON'T THINK YOU NEED -- I DON'T
23 SEE WHAT WOULD BE ADDED BY A NEW HYPOTHETICAL NEGOTIATIONS.
24 AND THE DIFFICULTY WITH NEW HYPOTHETICAL NEGOTIATIONS, IF YOU
25 DID IT IN 2006, YOU KNOW, ONE OF THE GROUND RULES FOR

1 HYPOTHETICAL NEGOTIATIONS IS THAT BB4 INFRINGEMENT COMMENCES.
2 THAT'S TO DO AWAY WITH THIS DISTORTION OF WHAT A FAIR VALUE FOR
3 THE PATENT WOULD BE BECAUSE OF THE THREAT OF LITIGATION. AND
4 THAT'S EXACTLY WHAT WOULD HAPPEN IF YOU HAD NEW HYPOTHETICAL
5 NEGOTIATIONS NOW.

6 Q. DO YOU AGREE THAT FINISAR'S ABILITY, AS THEY SAY IN THEIR
7 BRIEF, TO GRANT EXCLUSIVE LICENSES WOULD BE DESTROYED IF THE
8 COURT DOES NOT ORDER AN INJUNCTION?

9 A. NOT AT ALL.

10 Q. AND WHY NOT, SIR?

11 A. BECAUSE IT'S VERY COMMON IN LICENSING -- AND I'VE BEEN
12 ENGAGED IN A NUMBER OF LICENSES WHERE THERE IS A PREEXISTING
13 LICENSE AND A COMPANY NOW -- A PATENT OWNER NOW CHOOSES IT --
14 CHOOSES TO LICENSE IT AND WILL GRANT AN EXCLUSIVE LICENSE TO
15 SOMEONE ELSE SUBJECT TO THE EXISTING LICENSE. SO, FOR EXAMPLE,
16 FINISAR COULD GRANT AN EXCLUSIVE LICENSE TO STARSIGHT SATELLITE
17 OR SIRIUS SATELLITE FOR RADIO SATELLITE BROADCASTING SUBJECT TO
18 WHATEVER RIGHTS DIRECTV MIGHT HAVE. BUT IT DOESN'T -- THAT
19 DOES NOT DESTROY YOUR RIGHT TO GRANT SUBSEQUENT EXCLUSIVE
20 LICENSES. IT JUST HAS TO SUBJECT TO.

21 Q. HAVE YOU EVER BEEN INVOLVED IN A COURT CASE IN WHICH YOU
22 TESTIFIED AS TO A LUMP SUM ROYALTY FOR THE ENTIRE LIFE OF THE
23 PATENT WHICH WAS THEN ALLOCATED BY THE COURT?

24 A. WELL, YES, THE -- UNDER APPROPRIATE CIRCUMSTANCES, YOU MAY
25 COME UP WITH A LUMP SUM. IN A HYPOTHETICAL NEGOTIATION, YOU

1 MAY DETERMINE THAT A REASONABLE ROYALTY IS A LUMP SUM FOR THE
2 LIFE OF THE PATENT. AND THEN TO -- IT IS NECESSARY TO ALLOCATE
3 THAT LUMP SUM BACK TO THE DATE OF THE TRIAL. AND I'VE DONE
4 THAT ON MORE THAN ONE OCCASION, AND THAT WAS THE APPROPRIATE
5 ANALYSIS.

6 Q. OKAY. DO YOU AGREE WITH FINISAR'S POSITION AS STATED IN
7 THEIR BRIEF THAT THEY WOULD NOT BE ABLE TO SELL ITS PATENT
8 UNLESS THE COURT ORDERS AN INJUNCTION?

9 A. NO, I DON'T SEE HOW THAT CHANGES AT ALL. THEY COULD --
10 THEY COULD SELL IT TO ANYONE WHO MIGHT HAVE WANT TO BUY IT. IT
11 WOULD STILL BE SUBJECT TO WHATEVER ENCUMBRANCES THERE ARE,
12 WHICH MIGHT BE A LICENSE TO DIRECTV. BUT THEY COULD STILL SELL
13 IT.

14 Q. DO YOU AGREE THAT ANY COURT ORDERED ROYALTY WOULD HAVE AN
15 IMPACT ON FINISAR'S LICENSING EFFORTS?

16 A. YES. IT WILL HAVE AN EFFECT. IT'S GOT TO HAVE AN EFFECT.
17 THE VERY FACT -- WHETHER THERE'S A COMPULSORY LICENSE OR NOT,
18 THE VERY FACT THAT THE JURY DECIDED WHAT A REASONABLE ROYALTY
19 WOULD BE, AND THAT'S PUBLIC INFORMATION, THAT'S GOING TO HAVE
20 AN EFFECT ON WHAT HAPPENS IN THE FUTURE. I MEAN, THAT'S THE
21 WAY IT IS IN REAL LIFE.

22 Q. YOU HEARD MR. NAPPER TESTIFY ABOUT THE GEM STAR LICENSE.
23 DOES THE GEM STAR LICENSE COMPORT WITH YOUR TESTIMONY ABOUT THE
24 INDUSTRY'S STANDARD IN THIS CASE?

25 A. NOT REALLY. I THINK GEM STAR IS SOMEWHAT OF AN ANOMALY

1 FOR A NUMBER OF REASONS.

2 Q. WHAT ARE THE REASONS?

3 A. WELL, ONE THING, IT'S NOT A PATENT ONLY LICENSE. THERE
4 ARE OTHER -- OTHER RIGHTS THAT ARE INCLUDED IN THE GEM STAR,
5 SOME SERVICES, SOME RIGHTS TO DATA, TRADEMARKS, THINGS OF THAT
6 NATURE. ANOTHER THING IS THE GEM STAR PATENT PORTFOLIO IS A
7 COMBINATION OF THREE PATENT PORTFOLIOS. YOU HAVE GEM STAR, YOU
8 HAVE TV GUIDE, AND YOU HAVE STARSIGHT. GEM STAR PURCHASED TV
9 GUIDE AND STARSIGHT. AND ALL OF THOSE PATENTS TOGETHER,
10 THERE'S OVER 200 PATENTS THAT DIRECTLY RELATE TO ELECTRONIC
11 PROGRAM GUIDES. SO JUST A NUMBER OF PATENTS AND THE FACT THAT
12 THREE PATENT PORTFOLIOS WERE INVOLVED. ALSO, AT THE TIME OF
13 THE GEM STAR LICENSE, YOU KNOW, GEM STAR AND DIRECTV WERE
14 BASICALLY SISTER COMPANIES. NEWS CORP OWNED 80 PERCENT OF GEM
15 STAR AND THEN PURCHASED DIRECTV, SO THAT CERTAINLY FIGURED IN
16 THE OVERALL LICENSING STRUCTURE.

17 Q. IS IT STILL YOUR OPINION THAT THE APPROPRIATE MODEL IN THE
18 SATELLITE INDUSTRY AND CONSUMER ELECTRONICS INDUSTRY IS A PER
19 SET TOP BOX MODEL?

20 A. YES, SIR, IT IS.

21 Q. DOES THE IMPEG ARRANGEMENT CONTINUE TO REPRESENT THE
22 INDUSTRY PRACTICE?

23 A. YES, IT IS A VERY GOOD EXAMPLE.

24 Q. AND IS YOUR ANALYSIS BASED ONLY THE IMPEG LICENSE?

25 A. NO. THERE ARE -- THERE ARE OTHER LICENSING ARRANGEMENTS

1 THAT, YOU KNOW, I THINK I DISCUSSED IN MY TESTIMONY. LIKE
2 DOLBY, LIKE STARSIGHT, LIKE THOMPSON AND HNS, SET TOP BOX
3 LICENSE AGREEMENTS, THINGS OF THIS NATURE.

4 Q. OKAY. AND FINALLY WITH RESPECT TO YOUR DAMAGE REPORT
5 WHERE WE HAD SOME DIFFICULTY, WAS THAT DIFFICULTY CAUSED BY
6 TRYING TO ASCERTAIN HOW MANY SET TOP BOXES HAD BEEN ACTIVATED
7 IN THE PAST?

8 A. YES. THAT WAS THE -- THAT WAS THE DIFFICULTY.

9 Q. OKAY.

10 MR. SAVIKAS: NOTHING FURTHER. THANK YOU.

11 THE COURT: LET ME -- DO YOU RECALL THE RANGE
12 FOR THE DOLBY SET OF PATENTS?

13 THE WITNESS: YES, SIR. IT WENT FROM 12 CENTS
14 PER UNIT UP TO \$1.65, AND IT WAS BASED ON VOLUME. THE 12 CENTS
15 WAS -- I FORGET HOW MANY, MAYBE OVER THREE MILLION UNITS. YOU
16 GOT A VOLUME DISCOUNT THEN, THAT WENT ALL THE WAY DOWN TO 12
17 CENTS.

18 THE COURT: AND YOU SAID THE THOMPSON?

19 THE WITNESS: THOMPSON, I BELIEVE, WAS \$2.50 A
20 SET TOP BOX AT THAT TIME.

21 THE COURT: GEM STAR, AS I UNDERSTAND, IS THAT
22 THE 20 CENTS PER SUBSCRIBER PER MONTH?

23 THE WITNESS: THAT IS CORRECT; YES, SIR.

24 THE COURT: ALL RIGHT. THANK YOU. DO YOU HAVE
25 ANY QUESTIONS?

1 MR. VEDERKA: I DO, YOUR HONOR.

2 C R O S S E X A M I N A T I O N

3 BY MR. VEVERKA:

4 Q. GOOD AFTERNOON, MR. -- WELL, I GUESS IT'S STILL MORNING,
5 MR. DONALDSON.

6 A. GOOD MORNING.

7 Q. AGAIN, THIS IS C. J. VEVERKA ON BEHALF OF FINISAR.

8 MR. DONALDSON, IS IT YOUR UNDERSTANDING THAT DIRECTV HAS
9 SEVERAL NON-INFRINGEMENT ALTERNATIVES IT COULD QUICKLY PUT INTO
10 PLACE IF IT WANTED TO OR NEEDED TO?

11 A. MY ANALYSIS AT THE TIME OF HYPOTHETICAL NEGOTIATIONS IN
12 1995, AND IN 1995 THEY CERTAINLY DID. I HAVE NOT ANALYZED WHAT
13 WOULD HAPPEN TODAY.

14 Q. SO YOU -- YOU CAN'T TESTIFY ONE WAY OR THE OTHER IF THERE
15 EXISTS SUBSTANTIAL NON-INFRINGEMENT ALTERNATIVES TO DIRECTV
16 TODAY?

17 A. I HAVE NOT ANALYZED THAT; NO, SIR.

18 Q. I BELIEVE YOU TESTIFIED THAT THE -- WELL, LET ME ASK YOU
19 THIS QUESTION: YOU HAVE NOT CONTACTED ANYONE FROM THE JURY,
20 HAVE YOU?

21 A. NO, SIR.

22 Q. AND YOU'RE NOT AWARE OF ANYONE FROM DIRECTV OR DIRECTV'S
23 COUNSEL CONTACTING ANYONE FROM THE JURY?

24 A. NO, SIR.

25 Q. AND SO YOU REALLY DON'T KNOW WHAT METHODOLOGY THAT THE

1 JURY USED IN DETERMINING ITS ROYALTY -- ITS DAMAGE AMOUNT,
2 CORRECT?

3 A. I CANNOT KNOW PRECISELY.

4 Q. AND YOU ALSO DON'T KNOW THAT -- THAT MEANS YOU DON'T KNOW
5 THAT THE JURY ADOPTED YOUR PER SET TOP BOX METHODOLOGY; ISN'T
6 THAT ALSO CORRECT?

7 A. I DO NOT KNOW THAT FOR ABSOLUTE CERTAINTY; IT'S CERTAINLY
8 LIKELY.

9 Q. YOU BELIEVE IT'S CERTAINLY LIKELY. YOU'RE BASING THAT ON
10 YOUR SPECULATION, THOUGH, BECAUSE YOU DON'T KNOW WHAT HAPPENED
11 IN THIS JURY ROOM; IS THAT CORRECT?

12 A. NO. WHAT I'M BASING IT ON IS THE CLUSTER OF ROYALTY RATES
13 I TALKED ABOUT AND THE \$1.32 FALLING RIGHT IN THE MIDDLE OF
14 THAT MAKES IT HIGHLY LIKELY THAT THEY USED THAT APPROACH.

15 Q. YOU'RE SAYING YOU HAVE A GUESS, BUT IT'S EDUCATED?

16 A. I THINK IT'S EDUCATED; YES, SIR.

17 Q. BUT IT'S STILL A GUESS, ISN'T IT?

18 A. I'M NOT GOING TO ARGUE ABOUT SEMANTICS.

19 Q. NOW YOU ARGUED ABOUT A CLUSTER OF RANGES FOR SET TOP BOX
20 AGREEMENTS THAT YOU -- THAT YOU CONSIDERED OR TESTIFIED ABOUT.
21 I BELIEVE THAT YOU STATED THERE WAS A RANGE OF TEN CENTS TO
22 \$2.50; IS THAT RIGHT?

23 A. UP TO \$5.50.

24 Q. UP TO \$5.50. BUT IT WASN'T YOUR -- YOU TESTIFIED TO THE
25 JURY THAT THE APPROPRIATE AMOUNT WOULD BE 30 SOME CENTS PER SET

1 TOP BOX, DIDN'T YOU?

2 A. THAT IS CORRECT; YES, SIR.

3 Q. YOU DIDN'T TELL THE JURY I BELIEVE THAT YOU SHOULD
4 CONSIDER THIS RANGE OF TEN CENTS TO \$5 PER SET TOP BOX AND
5 FIGURE OUT A CALCULATION OF DAMAGES WITHIN THAT RANGE ON YOUR
6 OWN, DID YOU?

7 A. NO. I TESTIFIED TO THE JURY THE DIFFERENT RATES AND SAID
8 IT WAS MY CONCLUSION IT SHOULD BE 30 CENTS.

9 Q. RIGHT. SO YOU DIDN'T GIVE THE JURY A RANGE OF SET TOP
10 BOX -- LUMP SUM PER SET TOP BOX AMOUNTS TO CHOOSE FROM; YOU
11 TOLD THEM WHAT YOU THOUGHT THE RANGE -- WHAT THE PRECISE NUMBER
12 SHOULD HAVE BEEN?

13 A. YES. BECAUSE IN THE RANGE THAT I LOOKED AT, YOU THEN HAVE
14 TO LOOK AT THE GEORGIA PACIFIC FACTORS, THE AVAILABILITY OF
15 NONINFRINGING ALTERNATIVES TO ADJUST THAT RANGE, AND I DID ALL
16 THAT ANALYSIS AND DETERMINED IT WOULD BE 30 CENTS.

17 Q. I JUST WANT CLARIFY THAT YOU DIDN'T PROPOSE THAT RANGE TO
18 THE JURY FOR THEM TO USE THEMSELVES TO MAKE THEIR OWN
19 CALCULATION?

20 A. NO. I DID DISCUSS THE DIFFERENT ROYALTY RATES, HOWEVER.

21 Q. NOW AT TRIAL, MR. DONALDSON, I BELIEVE YOU ACKNOWLEDGED
22 THAT SOME OF THE AGREEMENTS YOU CONSIDERED IN MAKING YOUR
23 CALCULATIONS WERE ENTERED INTO BY DIRECTV AND SOME OTHERS LIKE
24 HUGHES NETWORK SYSTEM; ISN'T THAT CORRECT?

25 A. THAT IS CORRECT.

1 Q. AND, FOR EXAMPLE, ONE OF THE AGREEMENTS ENTERED INTO BY
2 DIRECTV WAS THE MACROVISION AGREEMENT; ISN'T THAT ALSO CORRECT?

3 A. THAT IS CORRECT.

4 Q. AND THAT AGREEMENT WAS NOT ENTERED INTO BY HUGHES NETWORK
5 SYSTEMS?

6 A. THAT IS ALSO CORRECT.

7 Q. AND I BELIEVE THAT YOU ALSO CHARACTERIZED THE MACROVISION
8 AGREEMENT AS INCLUDING A RUNNING ROYALTY STRUCTURE; THAT'S
9 CORRECT, ISN'T IT?

10 A. YES. THAT'S CORRECT.

11 Q. NOW, ANOTHER AGREEMENT THAT YOU HIGHLIGHTED WE'VE TALKED
12 ABOUT IT TODAY WAS THE IMPEG AGREEMENT.

13 THE COURT: AND WHAT WAS THE MACROVISION RUNNING
14 ROYALTY AGREEMENT RATE? I'M SURE YOU'RE GOING TO FOLLOW UP,
15 COUNSEL, BUT I'D LIKE TO WRITE IT DOWN NOW.

16 THE WITNESS: IT'S -- THEY HAVE THREE DIFFERENT
17 RANGES DEPENDING UPON WHETHER ITS CONTENTS PROTECTION FOR PAY
18 PER VIEW AND IT WAS JUST BASIC, IT WAS 0.75 PERCENT OF WHAT
19 DIRECTV CHARGED TO A CUSTOMER FOR THAT PAY PER VIEW EVENT.
20 THEY WERE --

21 THE COURT: ZERO WHAT?

22 THE WITNESS: 0.75 PERCENT, SO LESS THAN ONE
23 PERCENT. SO, IF THEY PAID \$3, IT WOULD BE LESS THAN ONE
24 PERCENT OF THE \$3 WOULD BE THE ROYALTY RATE. AND THEN THEY HAD
25 TWO OTHER -- THREE OTHER CATEGORIES, TWO OF THEM THE SAME.

1 THEY HAD AN EARLY VIEW WINDOW, SOMETHING TO THAT EFFECT, WHERE
2 YOU GOT AN EARLY RELEASE OF A MOVIE. THEN THE RATE WOULD BE, I
3 BELIEVE, IT WAS ONE PERCENT OF WHAT THE CUSTOMER PAID OR THREE
4 PERCENT OF ROUGHLY THE GROSS PROFITS. IT WAS WHAT THE CUSTOMER
5 PAID, SUBTRACT WHAT DIRECTV HAD TO PAY TO GET THAT PROGRAMMING.
6 AND THEN IT WOULD BE LIKE THREE PERCENT OF THAT; OR FOR REAL,
7 REAL EARLY REVIEW, IT WOULD BE FOUR PERCENT OF THAT BASICALLY
8 GROSS PROFIT.

9 THE COURT: I RECALL THE TESTIMONY NOW. GO
10 AHEAD.

11 Q. (BY MR. VEVERKA) NOW WITH RESPECT TO THE IMPEG AGREEMENT,
12 THAT WAS ENTERED INTO BY HUGHES NETWORK SYSTEMS, CORRECT?

13 A. THAT IS CORRECT.

14 Q. I BELIEVE YOU TESTIFIED THAT DIRECTV DID NOT ENTER INTO
15 THAT AGREEMENT?

16 A. THAT IS CORRECT.

17 Q. AND I BELIEVE THAT YOU WENT ON RECORD BOTH AT TRIAL AND IN
18 YOUR DAMAGE REPORT ARTICULATING THAT BOTH DIRECTV AND HUGHES
19 NETWORK SYSTEMS HAS ENTIRELY DIFFERENT BUSINESS MODELS?

20 A. THEY HAD DIFFERENT BUSINESS MODELS.

21 Q. HUGHES NETWORK SYSTEMS BEING A HARDWARE MANUFACTURER,
22 CORRECT?

23 A. THAT WOULD BE ONE OF THE DIFFERENCES, YES.

24 Q. MR. DONALDSON, YOU'RE FAMILIAR WITH THE 25 PERCENT RULE OR
25 THE RULE OF THUMB METHODOLOGY COMMONLY USED IN PATENT DAMAGES

1 CALCULATIONS, AREN'T YOU?

2 A. I'M AWARE OF THE 25 PERCENT RULE. HOW COMMONLY IT'S USED
3 IS UP IN THE AIR.

4 Q. I BELIEVE IN YOUR EXPERT REPORT YOU DESCRIBED IT AS A RULE
5 OR METHODOLOGY COMMONLY USED?

6 A. OKAY.

7 Q. YOU WOULD AGREE WITH THAT? THAT'S FAIR?

8 A. THAT'S FAIR.

9 Q. OKAY. AND YOU ALSO STATED IN YOUR EXPERT REPORT THAT THE
10 RULE OR METHODOLOGY IS MOST PROPERLY APPLIED TO PROFIT FROM
11 OPERATIONS, PARTICULARLY IN HIGH TECH INDUSTRIES, SUCH AS DBS;
12 IS THAT ALSO CORRECT?

13 A. I BELIEVE SO.

14 Q. AND WHEN YOU SAY PROFITS OF OPERATIONS, YOU MEAN
15 OPERATION -- THAT'S CALLED OPERATING PROFITS; IT'S ANOTHER WAY
16 OF SAYING OPERATING PROFITS, ISN'T IT?

17 A. IT IS.

18 Q. WHAT IS YOUR UNDERSTANDING THE DIFFERENCE BETWEEN
19 OPERATING PROFITS AND, SAY, OTHER TYPES OF PROFITS?

20 A. WELL, THERE'S A NUMBER OF MEASURES. THE MOST COMMON WOULD
21 BE GROSS PROFITS WHICH IS JUST REVENUES -- BASICALLY REVENUES
22 MINUS COST OF GOODS. THEN YOU HAVE PROFIT FROM OPERATIONS,
23 WHICH DEDUCTS ADDITIONAL EXPENSES, OVERHEAD, R&D, THINGS OF
24 THAT NATURE. THEN YOU HAVE NET PROFIT, WHICH IS STILL A
25 FURTHER -- YOU HAVE NET PROFIT BEFORE TAX, NET PROFIT AFTER

1 TAX, SO THE VARIOUS MEASURES.

2 Q. OKAY. AND UNDER THE -- UNDER THE 25 PERCENT RULE OR THE
3 RULE OF THUMB, A LICENSEE PAYS 25 PERCENT OF ITS OPERATIONAL
4 PROFITS TO THE PATENTEE, CORRECT?

5 A. WELL, THAT'S NOT WHAT THE 25 PERCENT RULE SAYS. IT'S A
6 TOOL THAT YOU MIGHT USE AS A STARTING POINT. IT DOESN'T SAY
7 DIRECTLY YOU APPLY THE 25 PERCENT RULE, AND THAT'S IT. IT'S A
8 STARTING POINT. IT'S A TOOL. BUT IT DOES RELATE TO PROFIT
9 FROM OPERATIONS AS THE BEST MEASURE.

10 Q. 25 PERCENT AND OPERATIONAL PROFITS IS THE STARTING POINT
11 UNDER THAT RULE, CORRECT?

12 A. THAT IS -- THAT'S THE MOST COMMONLY USED.

13 Q. AND THAT -- AND THAT IS BASED ON REVENUE; THAT'S NOT ON A
14 LUMP SUM BASIS, CORRECT, WHEN YOU'RE TALKING IN TERMS OF
15 OPERATIONAL PROFIT?

16 A. IT'S BASED UPON THE AMOUNT OF OPERATIONAL PROFIT.

17 Q. OKAY. ARE YOU AWARE THAT DIRECTV FORECASTS OPERATING
18 PROFIT FOR 2006 TO 2012 RANGING FROM 5.3 PERCENT TO 11.7
19 PERCENT?

20 A. I THINK THAT MIGHT BE CORRECT IN ONE OF THE FORECASTS.

21 Q. OKAY.

22 THE COURT: WHAT WERE THOSE NUMBERS AGAIN?

23 MR. VEVERKA: FROM 2006 TO 2012 OPERATING
24 PROFITS ARE FORECAST AS RANGING FROM 5.3 PERCENT TO 11.7
25 PERCENT.

1 THANK YOU, MR. DONALDSON. THAT'S ALL THE
2 QUESTIONS I HAVE.

3 MR. SAVIKAS: JUST ONE OR TWO QUESTIONS, YOUR
4 HONOR.

5 R E D I R E C T E X A M I N A T I O N
6 BY MR. SAVIKAS:

7 Q. MR. DONALDSON, MR. VEVERKA ASKED YOU ABOUT THE
8 IMPEG-DIRECTV RELATIONSHIP. UNDER THIS NEW PARADIGM WHERE
9 DIRECTV BUYS ALL OF THE OUTPUT FROM THE BOX MANUFACTURERS, HOW
10 IS THE LICENSING IN INTELLECTUAL PROPERTY HANDLED?

11 A. DIRECTV SPECIFIES TO THE SET TOP MANUFACTURERS THOMPSON,
12 SONY, WHOMEVER THEY ARE, WHAT THAT SET TOP BOX HAS TO INCLUDE,
13 THE SPECIFICATION. THEY ALSO SPECIFY THAT THEY WILL OBTAIN THE
14 LICENSES NECESSARY TO OPERATE, INCLUDING IMPEG, DOLBY, THINGS
15 OF THIS NATURE. AND THOSE -- THE COST OF THOSE LICENSES ARE --
16 ARE PART OF THE BILL AND MATERIALS FOR THOSE SET TOP BOXES THAT
17 DIRECTV THEN PAYS FOR. SO DIRECTV DIRECTS THEM TO OBTAIN THOSE
18 LICENSES ON THAT BEHALF OF DIRECTV, AND THEN THEY PAY THE SET
19 TOP BOX. THEY REIMBURSE THEM FOR THEM BASICALLY.

20 MR. SAVIKAS: ALL RIGHT. THANK YOU, SIR.
21 NOTHING FURTHER.

22 THE COURT: ANYTHING FURTHER? ALL RIGHT. YOU
23 MAY STEP DOWN.

24 THE WITNESS: THANK YOU.

25 MR. SAVIKAS: WE CALL THOMAS MCGEORGE.

1 THOMAS MCGEORGE,
2 HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

3 R E D I R E C T E X A M I N A T I O N

4 BY MR. SAVIKAS:

5 Q. WOULD YOU STATE YOUR FULL NAME FOR THE RECORD, SIR.

6 A. MY NAME IS THOMAS MCGEORGE.

7 Q. AND ARE YOU EMPLOYED BY DIRECTV, INC.?

8 A. YES, I AM.

9 Q. AND WHAT IS YOUR CURRENT TITLE?

10 A. I'M CURRENTLY VICE PRESIDENT OF SUPPLY CHAIN MANAGEMENT
11 FOR DIRECTV.

12 Q. AND WHAT ARE YOUR PRESENT RESPONSIBILITIES?

13 A. MY PRESENT RESPONSIBILITY IS TO PLAN AND PURCHASE FOR
14 DIRECTV ALL THEIR EQUIPMENT NEEDS.

15 Q. AS OF TODAY, WOULD YOU DESCRIBE HOW DIRECTV BUYS AND
16 DISTRIBUTES ITS SET TOP BOXES?

17 A. SURE. WE PURCHASE EQUIPMENT FROM SET TOP BOXES FROM SEVEN
18 TO EIGHT DIFFERENT MANUFACTURERS DIRECTLY. THEY MANUFACTURE
19 AND SELL DIRECTV BRANDED BOXES TO US. WE MOVE THOSE BOXES INTO
20 OUR WAREHOUSING SYSTEM. AND THEN SUBSEQUENTLY WE REDISTRIBUTE
21 THOSE BOXES TO OUR INSTALLERS FOR CUSTOMER INSTALLATION.

22 Q. DO THE MANUFACTURERS SELL THEIR DIRECTV BOXES TO ANYBODY
23 ELSE?

24 A. NO, THEY DON'T. THEY'RE EXCLUSIVE TO US.

25 Q. IF I WERE TO GO TO BEST BUY OR CIRCUIT CITY AND BUY A

1 DIRECTV BOX, WHERE WOULD THAT BOX COME FROM?

2 A. THAT BOX WOULD COME THROUGH THE SUPPLY CHAIN ORGANIZATION
3 AT DIRECTV. WE WOULD DISTRIBUTE THAT BOX FROM OUR WAREHOUSE TO
4 A BEST BUY OR CIRCUIT CITY.

5 Q. HOW MANY WAREHOUSES DO YOU HAVE?

6 A. WE CURRENTLY HAVE THREE WAREHOUSES.

7 Q. AND DO THE SET TOP BOX MANUFACTURERS EVER DROP SHIP ANY
8 DIRECTV BOXES?

9 A. 95 PERCENT OF THE BOXES THAT WE BUY COME THROUGH OUR
10 WAREHOUSING SYSTEM. FIVE PERCENT -- ROUGHLY FIVE PERCENT OF
11 THE BOXES GO DIRECT FROM THE MANUFACTURER TO OUR CUSTOMER.

12 ELECTRONICALLY WE HANDLE THAT TRANSACTION THROUGH OUR
13 WAREHOUSE. WE JUST DON'T PHYSICALLY HANDLE THE SET TOP BOX
14 MOVING THROUGH OUR WAREHOUSE.

15 Q. NOW, HOW LONG HAS DIRECTV HAD IN PLACE THIS METHOD OF
16 PURCHASING ITS BOXES?

17 A. WE TOOK OVER FULL FULFILMENT, FULL ACQUISITION AND
18 DISTRIBUTION EARLY 2005.

19 Q. AND BEFORE THAT DATE, HOW WERE THE SET TOP BOXES
20 DISTRIBUTED?

21 A. ROUGHLY BEFORE 2005 ROUGHLY 20 TO 30 PERCENT OF THE SET
22 TOP BOXES WERE PURCHASED BY DIRECTV AND REDISTRIBUTED BY
23 DIRECTV. THE OTHER 70 TO 80 PERCENT WERE MANUFACTURED BY THE
24 MANUFACTURERS, AND THEY HANDLED THE RELATIONSHIP WITH THE
25 CUSTOMER, BOTH FROM DISTRIBUTING THE EQUIPMENT AS WELL AS

1 TAKING CALLS IF THEY HAD A PIECE -- IF THEY HAD A PROBLEM WITH
2 THE EQUIPMENT.

3 Q. AND THAT SYSTEM IS TOTALLY CHANGED TODAY?

4 A. THAT'S CORRECT.

5 Q. WHAT KIND OF MANAGEMENT OR INVENTORY SYSTEM DO YOU EMPLOY?

6 A. WE USE A -- SAP SYSTEM, R3, THEY CALL IT. IT'S AN
7 INVENTORY TRACKING SYSTEM. WE USE THAT SYSTEM AS OUR INVENTORY
8 OF RECORD.

9 Q. AND DOES IT KEEP TRACK OF ALL OF YOUR INVENTORY WHETHER IT
10 COMES DIRECTLY TO YOU OR IS DROP SHIPPED?

11 A. ALL INVENTORY THAT WE MANAGE BOTH WITHIN OUR WAREHOUSE AS
12 WELL AS DROP SHIP IS MANAGED THROUGH OUR SAP R3 SYSTEM.

13 Q. IF THE COURT WERE TO REQUIRE DIRECTV TO PROVIDE FINISAR
14 AND THIS COURT WITH MONTHLY OR QUARTERLY REPORTS OF ALL SET TOP
15 BOXES SHIPPED BY DIRECTV OR DROP SHIPPED BY MANUFACTURERS,
16 COULD YOU PROVIDE SUCH REPORTS?

17 A. YES, WE COULD.

18 Q. AND COULD YOU PROVIDE SUCH REPORTS QUICKLY?

19 A. YES, WE COULD.

20 Q. AND WOULD THOSE REPORTS BE ACCURATE?

21 A. YES, THEY WOULD BE.

22 Q. WHY DO YOU SAY THEY WOULD BE ACCURATE?

23 A. WELL, WE TAKE A LOT OF -- WE PAY A LOT OF ATTENTION TO THE
24 INTEGRITY OF THE INFORMATION AND OUR INVENTORY SYSTEM. WE
25 ACTUALLY COUNT PARTS EVERY DAY AND RECONCILE DAILY TO INSURE

1 THAT THE INTEGRITY OF THE INFORMATION IS ACCURATE.

2 Q. AND UNDER OATH YOU COULD CONFIRM THE ACCURACY OF YOUR
3 INVENTORY SYSTEM?

4 A. YES, I CAN.

5 MR. SAVIKAS: THANK YOU. NOTHING FURTHER, YOUR
6 HONOR.

7 C R O S S E X A M I N A T I O N

8 BY MR. ROBERTS:

9 Q. CHARLES ROBERTS FOR FINISAR. MR. MCGEORGE, IS IT YOUR
10 UNDERSTANDING THAT WHEN A NEW SUBSCRIBER SIGNS UP WITH DIRECTV,
11 HE GETS A FREE DISH AND A NUMBER OF SET TOP BOXES?

12 A. THAT'S MY UNDERSTANDING.

13 Q. AND IS IT ALSO YOUR UNDERSTANDING THAT THOSE -- THE
14 CURRENT SET TOP BOXES ONLY PERMIT THE USE OF ONE TELEVISION?

15 A. PER BOX PER TV.

16 Q. AND DOES DIRECTV STILL SELL SET TOP BOXES THAT DO NOT HAVE
17 A DIGITAL VIDEO RECORDER IN THEM?

18 A. YES.

19 Q. SO IT'S POSSIBLE TO GET A DVR SET TOP BOX OR JUST A PLAIN
20 SET TOP BOX?

21 A. THAT IS CORRECT.

22 Q. AND IS IT YOUR UNDERSTANDING THAT CURRENT SET TOP BOXES
23 EACH HAVE ONLY ONE SMART CARD?

24 A. THAT'S CORRECT.

25 Q. AND YOU'RE AWARE THAT SOME CURRENT SET TOP BOXES ALLOW

1 SIMULTANEOUS RECORDING OF A SHOW AND ALLOW YOU TO WATCH ANOTHER
2 SHOW ON TELEVISION; IS THAT CORRECT?

3 A. YEAH. I'M -- THAT IS REALLY NOT PART OF MY
4 RESPONSIBILITY. MY RESPONSIBILITY IS REALLY THE MANAGEMENT OF
5 INVENTORY, NOT, YOU KNOW, THE FUNCTIONALITY OF THE BOX IN THE
6 HOME, SO...

7 Q. SO DO YOU KNOW WHETHER IT'S POSSIBLE IN A DIRECTV SET TOP
8 BOX THAT HAS A DIGITAL VIDEO RECORDER IN IT TO BE WATCHING ONE
9 TV SHOW WHILE SIMULTANEOUSLY RECORDING ANOTHER ONE?

10 A. FROM PERSONAL EXPERIENCE, YES.

11 Q. AND THAT'S BECAUSE THAT SET TOP BOX HAS NOT ONE, BUT TWO
12 TUNERS IN IT; IS THAT RIGHT?

13 A. THAT'S CORRECT.

14 THE CLERK: MR. ROBERTS, YOUR TIME IS UP.

15 THE COURT: I'M GOING TO ALLOW YOU TWO MORE
16 MINUTES TO HANDLE THE QUESTIONING. BUT, AS I STATED AT THE
17 CLOSE OF THE JURY PORTION OF THE TRIAL, I WAS GOING TO ALLOW
18 EACH SIDE AN HOUR, SO I'LL ALLOW YOU A FEW MORE MINUTES TO
19 FINISH YOUR QUESTIONING HERE. GO AHEAD.

20 MR. ROBERTS: THANK YOU, YOUR HONOR.

21 Q. (BY MR. ROBERTS) ARE YOU AWARE OF PLANS OF DIRECTV TO
22 ROLL OUT A HOME MEDIA CENTER SYSTEM COMPRISED OF A MAIN SERVER
23 AND SMALLER RECEIVER UNITS AT EACH TV?

24 A. I'M AWARE OF IT, YES.

25 Q. AND WOULD EACH OF THOSE SMALLER RECEIVER UNITS, IN YOUR

1 OPINION, BE CONSIDERED TO BE A SET TOP BOX?

2 A. I'M NOT SURE I'M QUALIFIED TO ANSWER THAT.

3 Q. ARE YOU AWARE THAT SOME SET TOP BOXES -- DIRECTV SET TOP
4 BOXES TODAY CAN BE EQUIPPED WITH A BROADCOM OR ST CHIP WHICH
5 CAN PROVIDE OUTPUT OF TWO DIFFERENT PROGRAMS TO TWO DIFFERENT
6 TELEVISIONS?

7 A. I'M NOT QUALIFIED TO ANSWER THAT AS WELL.

8 MR. ROBERTS: MAY I JUST APPROACH THE WITNESS,
9 YOUR HONOR, WITH AN EXHIBIT?

10 THE COURT: YOU MAY.

11 Q. (BY MR. ROBERTS) MR. MCGEORGE, I'LL ASK YOU, HAVE YOU
12 EVER SEEN THIS BROADCOM PRODUCT BRIEF BEFORE?

13 A. NO, I HAVEN'T.

14 Q. I NOTE ON HERE THAT THIS BRIEF SAYS THAT IT IS TALKING
15 ABOUT A SINGLE SHIP -- EXCUSE ME -- A SINGLE CHIP SATELLITE SET
16 TOP BOX DECODER. AND IT INDICATES IN THE LEFT-HAND COLUMN
17 UNDER FEATURES THAT -- IT MAKES REFERENCE TO THE DVB/DIRECTV
18 DECODER. DO YOU SEE THAT?

19 A. YES, I DO.

20 Q. AND IN THE RIGHT-HAND COLUMN UNDER THE SUMMARY OF BENEFITS
21 UNDER THE SECOND BULLET POINT IN THE SUBPARAGRAPH, IT
22 INDICATES: "SIMULTANEOUSLY SUPPORTS TWO TVS WITH INDEPENDENT
23 PROGRAMMING AND ONSCREEN DISPLAYS." DO YOU SEE THAT?

24 A. I DO.

25 Q. NOW MY QUESTION TO YOU IS: IN A DIRECTV SET TOP BOX, IT'S

1 FIT WITH ONE OF THESE BROADCOM CHIPS WHERE YOU CAN ACTUALLY
2 DRIVE TWO TELEVISIONS OFF IT. WOULD THAT, IN YOUR OPINION,
3 CONSTITUTE TWO SET TOP BOXES OR ONE?

4 A. YOU KNOW, I'M NOT THE TECHNICAL PART OF DIRECTV HERE. I
5 MANAGE THE MOVEMENT AND PURCHASING OF DIRECTV SET TOP BOXES, SO
6 I -- I REALLY CAN'T COMMENT ON IT.

7 Q. DO YOU HAVE ANY IDEA HOW LONG IT WILL BE BEFORE SET TOP
8 BOXES ARE AVAILABLE THAT INCLUDE MULTIPLE TUNERS AND A LARGE
9 HARD DRIVE SO THAT A SUBSCRIBER ONLY NEEDS ONE BOX TO DRIVE ALL
10 THE TELEVISIONS IN THEIR HOME?

11 A. I'M NOT AWARE OF WHEN IT WILL BE AVAILABLE, NO.

12 MR. ROBERTS: THANK YOU. NO QUESTIONS, YOUR
13 HONOR.

14 MR. SAVIKAS: NOTHING FURTHER, YOUR HONOR.

15 THE COURT: DO YOU HAVE ANY FORECAST ON HOW MANY
16 SET TOP BOXES YOU'RE PLANNING ON DISTRIBUTING DURING THIS
17 COMING YEAR?

18 THE WITNESS: YES, WE DO.

19 THE COURT: ALL RIGHT. WHAT IS IT?

20 THE WITNESS: I DON'T HAVE THE DOCUMENT WITH ME,
21 BUT I THINK THE NUMBER IS SOMEWHERE IN THE 15 MILLION RANGE FOR
22 2006.

23 THE COURT: AS I UNDERSTAND IT, IN THE LAST --
24 WELL, SINCE 1999, IT WAS SOMETHING IN THE RANGE OF 59 MILLION
25 BOXES. IS THAT THE NUMBER EVERYBODY WAS USING? YEAH, WELL,

1 SOMEWHERE BETWEEN 55 MILLION AND 59 MILLION IS WHAT I THINK THE
2 NUMBERS CAME OUT TO BE. BUT AT THE SAME TIME, AS I UNDERSTAND
3 IT, THE TOTAL NUMBER OF SUBSCRIBERS IS 15 MILLION; IS THAT
4 RIGHT?

5 THE WITNESS: THAT'S CORRECT.

6 THE COURT: SO THERE WAS SOME DISCUSSION AT
7 TRIAL INVOLVING WHAT THEY CALLED, I GUESS, CHURN AND SO FORTH.
8 WHY IF YOU HAVE 15 MILLION SUBSCRIBERS -- I GUESS THERE'S SOME
9 PEOPLE ADDING AND DROPPING -- IS THE TOTAL OF NUMBER OF BOXES
10 SO MUCH GREATER THAN THE TOTAL NUMBER OF SUBSCRIBERS?

11 THE WITNESS: WELL, THERE'S A CERTAIN AMOUNT
12 OF -- YOU KNOW, EACH CUSTOMER CARRIES MORE THAN ONE BOX.

13 THE COURT: OKAY.

14 THE WITNESS: AND THERE IS A CERTAIN LEVEL OF
15 CUSTOMERS THAT CHURN OUT, THAT LEAVE DIRECTV. AND TYPICALLY
16 THOSE BOXES STAY IN THE FIELD. THEY'RE NOT ACTIVATED. THEY'RE
17 DEACTIVATED, SO THEY'RE VIRTUALLY A DEAD BOX IN THE FIELD.

18 THE COURT: ALL RIGHT.

19 THE WITNESS: DOES THAT ANSWER YOUR QUESTION?

20 THE COURT: YES. ALL RIGHT. YOU MAY STEP DOWN,
21 SIR.

22 MR. CASTANIAS: THANK YOU, YOUR HONOR. MAY IT
23 PLEASE THE COURT. GREG CASTANIAS FOR THE DEFENDANTS. I'LL TRY
24 TO BE BRIEF BECAUSE OUR BRIEFS THAT WE FILED ON JUNE 28TH AND
25 YESTERDAY SHOULD LAY OUT MOST OF THE POINTS. AND I THINK THE

1 COURT APPRECIATES MANY OF THEM. BUT I'LL ADDRESS -- I'M SORRY.

2 THE COURT: I THOUGHT YOU SAID THERE WAS A THIRD
3 WITNESS, OR DID I ALREADY MISS HIM?

4 MR. SAVIKAS: NO. THERE WAS ONLY TWO.

5 THE COURT: OKAY. I'M SORRY. I THOUGHT YOU
6 GAVE ME THREE NAMES. GO AHEAD.

7 MR. CASTANIAS: IN ANY EVENT, YOUR HONOR, I'LL
8 BRIEFLY ADDRESS FIVE ISSUES: ONE, THE ISSUE OF THE INJUNCTION
9 AND WHY A COMPULSORY LICENSE DOES WORK HERE; TWO, THE
10 ENHANCEMENT ISSUE; THREE, ATTORNEY'S FEES; FOUR, PREJUDGMENT
11 INTEREST; AND FINALLY, FIVE, THE ISSUE OF COST.

12 LET ME FIRST TURN TO THE ISSUE OF THE
13 INJUNCTION. OUR PAPERS HAVE LAID OUT OUR POSITION ON THIS
14 ISSUE. THERE'S NOTHING CATEGORICAL ABOUT WHAT WE'RE SUGGESTING
15 TO THE COURT. THIS IS EXACTLY THE CASE WHERE AN INJUNCTION
16 WOULD BE INAPPROPRIATE. WITH REGARD TO IRREPARABLE INJURY,
17 FINISAR DOES NOT COMMERCIALIZE. THE COURT NOTED THE TESTIMONY
18 OF DR. LEVINSON AND MR. RAWLS AFTER THE JURY RETURNED ITS
19 VERDICT. FINISAR HAS NEVER ANSWERED THOSE POINTS.

20 WITH REGARD TO THE ADEQUACY OF MONEY DAMAGES TO
21 COMPENSATE BEARS REPEATING, THAT'S ALL FINISAR EVER WANTED.
22 THEIR TRIAL FEE WAS -- ALL WE WANTED WAS A LICENSE. THOSE ARE
23 THE TWO POINTS ON WHICH THE COURT IDENTIFIED THAT THERE WAS
24 ALREADY STRONG EVIDENCE.

25 SO LET ME TURN TO THE OTHER TWO NOW. HARM TO

1 THE PUBLIC. WE PUT IN OUR BRIEF FILED YESTERDAY THE POINTS
2 ABOUT THE FCC'S AND THE DEPARTMENT OF JUSTICE ANTI-TRUST
3 DIVISION FINDINGS WITH RESPECT TO THE PUBLIC INTEREST. THOSE
4 HAVE NOT BEEN ANSWERED BY FINISAR IN ITS ARGUMENTS TODAY. THEY
5 WERE NOT MENTIONED IN THE BRIEF. MR. NAPPER COULD NOT OPINE ON
6 THOSE, EVEN THOUGH THE DEPARTMENT OF JUSTICE'S PRESS RELEASE
7 WAS ATTACHED TO FINISAR'S VARIED COMPLAINT IN THIS CASE.

8 FINALLY, WITH RESPECT TO THE BALANCE OF HARMS,
9 WE POINTED THAT OUT IN OUR BRIEF YESTERDAY AS WELL. DIRECTV
10 WOULD SUFFER GOVERNMENTAL AND OTHER PENALTIES, AS WELL AS
11 SERIOUS ECONOMIC HARM. FINISAR WILL GET PAID. THE BALANCE OF
12 HARMS IS WILDLY, WILDLY TIPPED AGAINST US.

13 THE COURT: WAIT A MINUTE. WHAT PENALTIES IS
14 DIRECTV GOING TO SUFFER IF I GRANT AN INJUNCTION?

15 MR. CASTANIAS: DIRECTV, AS WE POINTED OUT IN
16 OUR BRIEF YESTERDAY, COULD SUFFER THE LOSS OF ALL OF ITS
17 BROADCASTING LICENSES THAT THE FCC HAS GRANTED IN THE PUBLIC
18 INTEREST HERE AS WELL. THOSE ARE THE SORTS OF PENALTIES IN
19 ADDITION TO THE SERIOUS ECONOMIC --

20 THE COURT: HOW LONG A PERIOD OF TIME DO THEY
21 HAVE TO BE SHUT DOWN BEFORE THAT HAPPENS? I MEAN, OBVIOUSLY
22 HURRICANE COMES THROUGH AND WIPES EVERYTHING OUT, THEY DON'T
23 WITHDRAW YOUR LICENSES FOR A DAY OR A WEEK SHUTDOWN.

24 MR. CASTANIAS: I THINK THAT WOULD BE UP TO THE
25 FCC. IT IS A RISK. I THINK THAT'S PROBABLY THE FAIREST WAY TO

1 PUT IT.

2 THE COURT: YOU'VE GOT NO IDEA IN THE CODE OF
3 FEDERAL REGULATIONS OR IN THE LICENSE LANGUAGE ITSELF OR
4 ANYTHING ELSE, THAT WOULD GIVE AN INDICATION OF -- I MEAN,
5 OBVIOUSLY IT WOULDN'T BE A VOLUNTARILY. IT WOULD BE ALMOST A
6 FORCE MEASURE, AND THE COURT'S NOT -- I'M NOT TRYING TO SAY I'M
7 AN ACT OF GOD, BUT IT'S SURELY OUTSIDE YOUR CONTROL.

8 MR. CASTANIAS: YOUR HONOR, I THINK NO RESPONSE
9 TO THAT PART WOULD BE APPROPRIATE, BUT WITH REGARD TO --

10 THE COURT: THE HIGHER COURTS MAYBE, BUT NOT ME.

11 MR. CASTANIAS: WITH REGARD TO -- WITH REGARD TO
12 THE FCC, THE CODE OF FEDERAL REGULATIONS PROVISION -- AND I
13 HAVE TO MAKE SURE I GET THE TITLE CORRECT FOR YOU HERE -- IS --
14 IT IS IN THE COMMUNICATIONS TITLE, BUT I WISH I COULD TELL YOU
15 THAT I HAVE THAT MEMORIZED OFF THE TOP OF MY HEAD, 47 CFR, AND
16 IT'S SECTION 25.161, IN PARTICULAR 25.161 (C) DEALING WITH THE
17 AUTOMATIC TERMINATION OF STATION AUTHORIZATION. AND WHETHER
18 THAT -- I MEAN, THAT IN AND OF ITSELF WOULD BE HARM TO DIRECTV.
19 EVEN IF, FOR EXAMPLE, THERE WAS A SHUTDOWN, THE FCC DECIDED TO
20 TERMINATE OUR LICENSE. THAT MEANS THAT WE NOW HAVE A
21 GOVERNMENTAL POTENTIAL BARRIER TO ENTRY -- REENTRY INTO THE
22 MARKET EVEN IF WE COULD GET A NONINFRINGING ALTERNATIVE.

23 LET ME TURN TO FINISAR'S EXCLUSIVE LICENSE
24 THEORY. AS WE POINTED OUT IN OUR BRIEF YESTERDAY, IT'S JUST
25 ANOTHER CREATIVE WAY OF ARGUING THAT THE PATENT'S RIGHT TO

1 EXCLUDE IS ALWAYS IRREPARABLE HARM. IT COULD NEVER BE REMEDIED
2 THROUGH MONEY. AND TODAY WE HEARD THAT EBAY DIDN'T REALLY
3 CHANGE THE LAW. I -- I MUST CONFESS THAT WE COMPLETELY
4 DISAGREE WITH THAT. I THINK JUDGE DAVIS DISAGREED WITH IT IN
5 THE Z4 DECISION. AND MORE TO THE POINT, I THINK IT'S WORTH
6 NOTING THAT THEY'VE GIVEN YOU TWO BRIEFS IN THIS CASE
7 SUGGESTING WHAT THE LAW IS. WHAT THEY GAVE YOU WAS THE
8 SOLICITOR GENERAL'S BRIEF. AND THEY LOST BECAUSE THE SOLICITOR
9 GENERAL WANTED AFFIRMANCE IN THE EBAY, AND THEY DIDN'T GET IT.
10 AND THEY GAVE YOU THE RESPONDENT'S BRIEF FILED BY MERCEXCHANGE
11 IN THE EBAY CASE. AND, AGAIN, THAT WAS THE PARTY SEEKING
12 AFFIRMANCE. AND IF YOU LOOK AT THE LAST LINE OF JUSTICE
13 THOMAS'S OPINION FOR THE MISSOURI, THE CASE WAS REVERSED. IT
14 WAS REMANDED. THE INJUNCTION WAS VACATED.

15 SO IF THE COURT NEEDS ANY ADDITIONAL EVIDENCE
16 THAT THE LAW HAS CHANGED, IT'S RIGHT ON THE FACE OF EBAY. LET
17 ME RESPOND TO JUST THE --

18 THE COURT: WELL, I GUESS ANOTHER WAY YOU CAN
19 LOOK AT IT IS THE SUPREME COURT HAS PUT THE LAW BACK TO WHERE
20 IT ALWAYS HAS BEEN IN INJUNCTIONS, AND IT'S JUST THE -- THEY'RE
21 IN EFFECT SAYING THAT THE FIFTH CIRCUIT GOT A LITTLE OFF TRACK.

22 MR. CASTANIAS: THAT'S AN EXCELLENT WAY OF
23 PUTTING IT THERE, YOUR HONOR, BECAUSE THAT ANSWERS THE HEAVY
24 RELIANCE ON THE IN RE MAHURKAR DECISION FROM JUDGE EASTERBROOK,
25 A DISTINGUISHED JUDGE TO BE SURE, AN APPELLATE JUDGE SITTING AS